Supreme Court, U.S.
FILED
MAY 4 1994
OFFICE OF THE CLERK

No. 93-1487

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

WARRIOR & GULF NAVIGATION COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITIONER'S REPLY BRIEF

CARL B. FRANKEL
RUDOLPH L. MILASICH, JR.
Five Gateway Center
Pittsburgh, PA 15222

FREDERICK T. KUYKENDALL, III
SAMUEL H. HELDMAN
505 North 20th Street
1100 Financial Center
Birmingham, AL 35203

ROBERT M. WEINBERG
(Counsel of Record)
ANDREW D. ROTH
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
Arco-Polymers, Inc. v. Local 8-74, 671 F.2d 752 (3d Cir.), *cert. denied*, 459 U.S. 828 (1982)	2, 3
Craft Precision Indus. v. Lodge No. 1836 of District 38, Int'l Ass'n of Machinists & Aerospace Workers, 889 F.2d 1184 (1st Cir. 1989)	3, 4
Eberhard Foods, Inc. v. Handy, 868 F.2d 890 (6th Cir. 1989)	4
Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union, 864 F.2d 940 (1st Cir. 1988)	4
Kerr-McGee Chem. Corp. v. United Steelworkers of America, 800 F. Supp. 1405 (N.D. Miss. 1992), *aff'd mem.*, 988 F.2d 1214 (5th Cir. 1993)	4, 5
Lattimer-Stevens Co. v. United Steelworkers of America, 913 F.2d 1166 (6th Cir. 1990)	6
S.D. Warren Co. v. Paperworkers Int'l Union, 845 F.2d 3 (1st Cir.), *cert. denied*, 488 U.S. 992 (1988)	4
Super Tire Engineering v. Teamsters Local Union No. 676, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984)	3
United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)	6, 7
United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987)	6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1487

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

WARRIOR & GULF NAVIGATION COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITIONER'S REPLY BRIEF

The United Steelworkers of America, AFL-CIO-CLC, hereby files this reply brief in support of its petition for a writ of certiorari in the above-captioned case.

I.

In Part I of our petition, we showed that the decision below is in direct conflict with decisions of the First, Third, Fifth and Sixth Circuits on a recurring issue of federal labor law. *See* Petition for Certiorari at 7-15 ("Pet."). Respondent argues in its opposition brief that there is no such circuit conflict on an issue of federal *law*, because the decision below is distinguishable on its *facts* from each of the other circuit decisions. *See* Respondent's Brief in Opposition ("Opp. Cert.") at 6-12. Respondent could not be more wrong.

A. As we demonstrate below, the facts of this case cannot be distinguished from the facts of the other cited circuit cases in any *material* respect. In each of those cases, the employer and the union had agreed to two separate contract provisions that were identical *in substance* to the two contract provisions at issue here—(1) a provision limiting an employer's right to discharge employees to situations in which the discharge is for "just" or "proper" cause; and (2) a provision stating that certain specified conduct will "subject" employees to (or "may result in") discharge—and to a broad form arbitration clause. In each of those cases, as in this one, the arbitrator, acting under the broad arbitration clause, interpreted the two substantive provisions together to mean that the fact that an employee had engaged in conduct that rendered him "subject to" discharge did not necessarily establish that the employer had "just cause" for discharge. Accordingly, in each of those cases, as in this one, the following issue of federal law was squarely presented: Where an employer and union have agreed to such contractual provisions, what is the proper scope of judicial review of an arbitral decision finding that an employee who has engaged in the prohibited conduct has nonetheless been discharged without "just cause"?

B. According to respondent, *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3d Cir.), *cert. denied*, 459 U.S. 828 (1982), is distinguishable on its facts because the contract here provides that "the right to . . . discharge for proper cause is vested exclusively in the Company," whereas "[n]o such language vesting discharge exclusively in management was cited in the *Arco-Polymers* case." Opp. Cert. at 7. But the contract here does *not* vest in respondent the exclusive right to discharge an employee; to the contrary, it gives respondent the exclusive right to discharge an employee *if but only if* the discharge is "for proper cause."[1] This limitation on the respondent's ex-

[1] Respondent's attempt to read this "for proper cause" limitation out of the contract is more dramatically illustrated in the conclusion to its opposition brief, where respondent simply omits the

clusive right to discharge an employee is no different in kind from the limitation imposed on the employer in *Arco-Polymers*, where the contract provided that "[e]mployees shall be discharged only for just cause." 671 F.2d at 752-53.[2]

Craft Precision Indus. v. Lodge No. 1836 of District 38, Int'l Ass'n of Machinists & Aerospace Workers, 889 F.2d 1184 (1st Cir. 1989), says respondent, is distinguishable on the ground that the contract there provided that insubordination was an example of conduct that "'may result in suspension, *or* immediate discharge,'" Opp. Cert. at 7 (quoting 889 F.2d at 1184) (emphasis added), and "could logically be interpreted to mean that insubordination, under certain circumstances, could warrant merely suspension rather than immediate discharge, thus giving an arbitrator discretion to review the severity

---

words "for proper cause" from its quotation of the relevant contract language. *See* Opp. Cert. at 15-16.

[2] Respondent also seeks to distinguish the Third Circuit's subsequent decision in *Super Tire Engineering v. Teamsters Local Union No. 676*, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984), on the ground that the arbitrator's decision to reinstate the employee in that case was based on the fact that "the employer had never applied the 'immediate dismissal' provision to previous, similar offenses," whereas "there is no question in this case regarding the uniform application of the 'immediate discharge' language in the WGN/USWA contract." Opp. Cert. at 10 n.2. However, under respondent's own legal theory—the theory adopted and applied by the court below—this factual distinction is wholly irrelevant. Respondent's legal theory is that a contract provision "subjecting" an employee to "immediate discharge" for certain prohibited conduct necessarily gives the employer the complete discretion to discharge an employee who is found to have engaged in that conduct—thereby denying an arbitrator the authority to consider the range of issues that he or she would ordinarily consider in determining whether the employee had been discharged for "just cause," including the issue of whether the employer had uniformly applied the "subject to immediate dismissal" provision to previous, similar offenses. Respondent's legal theory was rejected by the Third Circuit in *Super Tire*, *see* 721 F.2d at 124-25, but accepted by the Eleventh Circuit here, *see* 996 F.2d at 281 & n.7.

of the penalty imposed." Opp. Cert. at 8. Under respondent's own legal theory—the theory adopted and applied by the court below—this factual distinction is wholly irrelevant. Under that legal theory, a "may result in" or a "subject to" discharge provision clearly and unquestionably grants the employer the complete and unfettered discretion to effectuate a discharge without regard to any other provision of the agreement. *See* 996 F.2d at 281 & n.7. On that theory *Craft Precision* is indistinguishable from this case and wrongly decided.[3]

In *Eberhard Foods, Inc. v. Handy*, 868 F.2d 890 (6th Cir. 1989), the collective bargaining agreement contained a "just cause" provision, and the employer and the union also negotiated and agreed upon a series of work rules, including a rule that employees who fight on company time or property are "subject to discharge for the first offense." Respondent is quite correct in noting that the work rules agreed to by the parties explicitly provided that the rules did not " 'supersede any clauses that may be contained in said contract.' " Opp. Cert. at 9 (quoting 868 F.2d at 892). But, as in this case, the question remained whether the employer necessarily had "just cause"

---

[3] Contrary to respondent's assertion, *see* Opp. Cert. at 8, the facts of this case are not closer in line to those in the First Circuit's earlier decisions in *S.D. Warren Co. v. United Paperworkers Int'l Union*, 845 F.2d 3 (1st Cir.), *cert. denied*, 488 U.S. 992 (1988) and *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940 (1st Cir. 1988). In both of those cases, the contract explicitly stated that certain prohibited conduct constituted "cause" for discharge, leading the First Circuit to conclude that employees discharged for engaging in such conduct had necessarily been discharged for "cause." As the First Circuit later concluded in *Craft Precision*, and as the court agreed in *Kerr-McGee Chem. Corp. v. United Steelworkers of America*, 800 F. Supp. 1405, 1410 & n.8 (N.D. Miss. 1992), *aff'd mem.*, 988 F.2d 1214 (5th Cir. 1993), a contract provision explicitly stating that certain prohibited conduct constitutes "cause" for discharge is appreciably different in substance from a contract provision stating that certain conduct will "subject" the employee to—or "may result in"—discharge.

under the contract to discharge an employee who had engaged in conduct that the parties had agreed would "subject [employees] to discharge for the first offense." On the respondent's legal theory there is only one answer to this question and that answer is "yes." In *Eberhard* the arbitrator answered this question "no" and the Sixth Circuit upheld the arbitrator's award on the specific ground that the court's role in reviewing contract interpretations in labor arbitration decisions is narrowly circumscribed. *See* 868 F.2d at 893.

Respondent does not even attempt to identify any material difference in the contract provisions at issue in this case and in *Kerr-McGee Chem. Corp. v. United Steelworkers of America*, 800 F. Supp. 1405 (N.D. Miss. 1992), *aff'd mem.*, 988 F.2d 1214 (5th Cir. 1993), and there is none.[4]

II.

In Part II of our petition, we showed that the conflict between the circuits on the extent to which courts should review arbitral decisions reconciling "just cause" and "subject to discharge" provisions manifests a more general disagreement among the circuits on the authority of the federal courts to correct purported "misinterpretations" of a labor contract by an arbitrator. Pet. at 15-19. Respondent attempts to refute the existence of this broader circuit conflict in the same manner that it seeks to explain away the circuit conflict described in Part I of our petition: by asserting that the "bases for the hold-

[4] Respondent does assert that the distinction between the two cases lies in the "different *factual* conclusions" reached by the two courts regarding the scope of the arbitrator's authority under the "different collective bargaining agreements at issue in each case." Opp. Cert. at 10 (emphasis added). This assertion defies reason. Because the "different collective bargaining agreements at issue" in the two cases contained provisions that were identical in all relevant respects, the different conclusions reached by the two courts regarding the scope of the arbitrator's authority were different *legal* conclusions, and not different factual conclusions.

ings" in these circuit cases "are the differing facts and contractual provisions at issue in those cases," rather than any disagreement on the applicable law. Opp. Cert. at 12.

The decisions belie that assertion. The cases in question did arise in a number of different factual settings involving a number of different collective bargaining agreement provisions, but those differences were not the basis of the different results. Those different results, as we showed, stemmed from the adoption by different circuits of different legal standards for reviewing contract interpretations in labor arbitration decisions. *See* Pet. at 15-18. It is very much to the point, as one federal circuit court judge was moved to observe upon surveying the pertinent circuit decisions, that "[r]eview of arbitration decisions is one of the more difficult and standardless enterprises facing an appellate judge." *Lattimer-Stevens Co. v. United Steelworkers of America*, 913 F.2d 1166, 1170 (6th Cir. 1990) (Boggs, J., dissenting).[5]

III.

Finally, respondent argues that this Court should not grant a writ of certiorari to review the decision of the Eleventh Circuit in this case because that decision illustrates "the proper role of courts in reviewing arbitration awards," as articulated by this Court in one of the *Steelworker* Trilogy cases, *United Steelworkers of America v.*

---

[5] In our petition, we also noted that the various legal standards adopted by the circuits since this Court's decision in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), have proven very difficult to apply, as illustrated by the substantial number of 2-1 decisions in the post-*Misco* period. Pet. at 18 n.8. The 2-1 decisions in these cases obviously cannot be explained on the basis of "the differing facts and contractual provisions at issue in those cases." Opp. Cert. at 12. To the contrary, those 2-1 decisions underscore the sharp disagreement among federal circuit court judges—including judges in the same circuit—concerning the appropriate legal standards to be applied in reviewing arbitral interpretations of collective bargaining agreements.

Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). Opp. Cert. at 14.

This is, of course, neither the time nor the place to brief the Eleventh Circuit's decision on its merits. It is sufficient for present purposes to note that respondent's description of this Court's holding in *Enterprise Wheel* is incomplete and misleading: after noting that an arbitrator's interpretation of a collective bargaining agreement must "draw[] its essence" from the contract, 363 U.S. at 597, the *Enterprise Wheel* Court went on to elaborate that "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his," *id.* at 599. Similarly, in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987), after noting that an arbitrator "may not ignore the plain language of the contract," the Court—in language that respondent and the court below ignore—immediately went on to state that "but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." It is our submission that—as the above-quoted passages and the decisions of other circuits strongly suggest—the court below exceeded its proper role in striking down an arbitration award interpreting and reconciling the two contract provisions here at issue.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

CARL B. FRANKEL
RUDOLPH L. MILASICH, JR.
Five Gateway Center
Pittsburgh, PA 15222

FREDERICK T. KUYKENDALL, III
SAMUEL H. HELDMAN
505 North 20th Street
1100 Financial Center
Birmingham, AL 35203

ROBERT M. WEINBERG
(Counsel of Record)
ANDREW D. ROTH
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006